Supreme Court, U. S.
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No. 72-953

In the Supreme Court of the United States

MICHAEL O'SHEA, as Magistrate of the Circuit Court for Alexander County, Illinois and DOROTHY SPOMER, as Associate Circuit Judge for Alexander County, Illinois,

Petitioners,

vs.

EZELL LITTLETON, MANKER HARRIS, JAMES WILSON, CARL HAMPTON, HAZEL JAMES, WALTER GARRETT, CHARLES KOEN, FRANK WASHINGTON, CURTIS JOHNSON, CHERYL GARRETT, YVONDA TAYLOR, RUSSELL DEBERRY, ROBERT MARTIN, PRESTON EWING, JR., JAMES BROWN, HERMAN WHITFIELD, WALLACE WHITFIELD, LEROY LAMBERT, by his father and next friend, HOBERT LAMBERT, MORRIS GARRETT, by his father and next friend, LEVI GARRETT, Individually and as Representatives of a Class,

Respondents.

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS.

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Respondents.

MOTION FOR PERMISSION TO FILE BRIEF AS AMICUS CURIAE

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Now comes the Illinois State Bar Association, Movant herein, by its attorneys, Jack E. Horsley and Richard F. Record, Jr., of Craig & Craig, and respectfully moves that the Court enter an order allowing Movant to file its Brief as Amicus Curiae in support of the Petitioners and in support of said Motion, states as follows:

1. That the consent of the attorney for the Petitioners has been obtained and his letter to that effect is on file with the Clerk of this Court and consent of the attorney for the Respondents has been declined but that attorney has stated, as more fully shown by the affidavit attached hereto and made a part of this Motion, that the Respondents do not object to the filing of the Motion or the allowance of this Motion by this Court nor the filing of a Brief by this Movant pursuant to said Order of this Court.

2. That the interest of the Illinois State Bar Association in this case arises from the fact that it is the principal lawyers' organization in the State of Illinois and as such is vitally interested on a professional basis in the maintenance of an independent judiciary in the State of Illinois and, because of its obligation to the courts generally as well as the public and its own membership, has a direct and immediate interest in this litigation and is in a position to and has a positive obligation to present data and suggestions in support of the position taken by the Petitioners in this matter.

3. That the Petitioners and Respondents have discussed the issues before this Court primarily in terms of judicial immunity and while that is an important issue neither side has discussed what is a much more fundamental question, viz., whether the federal judiciary can or should undertake to supervise the judicial function or any phase thereof as carried out by the judiciary of the State of Illinois and thereby destroy the independence of said state judicial system and make impossible the administration of criminal justice in the state courts of Illinois.

4. That both the Petitioners and Respondents have discussed the effects of the decision of the Seventh Circuit upon the judiciary of the State of Illinois and although the effects upon the federal judiciary have been mentioned briefly insufficient attention has been given to the substantial adverse effect upon the federal judiciary of the Seventh Circuit's opinion.

5. That Movant has prepared a Brief amicus curiae, true copy of which is attached hereto and incorporated herein by reference as though fully set forth, containing a more complete argument on the aforesaid issues and if said argument is accepted, same would be dispositive of this case.

Respectfully submitted,

JACK E. HORSLEY
and
RICHARD F. RECORD, JR.
Of Craig & Craig
1807 Broadway
Mattoon, Illinois 61938
Attorneys for Illinois State Bar Association, Amicus Curiae.

State Of Illinois)
) ss.
County Of Cook)

I, JACK E. HORSLEY, one of the attorneys herein for the Movant ILLINOIS STATE BAR ASSOCIATION, being first duly sworn, state under oath and depose that on Tuesday, September 4, 1973, James B. O'Shaughnessy of Schiff, Hardin & Waite of Chicago, Illinois, attorney for the Respondents in this matter, after receiving a request from the Movant for consent by the Respondents herein to the filing of the Brief of the aforesaid ILLINOIS STATE BAR ASSOCIATION as amicus curiae of this Court authorized the attorneys for the Movant ILLINOIS STATE BAR ASSOCIATION to advise the Court that the Respondents would not consent to the filing by the ILLINOIS STATE BAR ASSOCIATION of an amicus curiae brief herein but would not object to the Court's allowing Movant's motion for leave to file an amicus curiae brief.

Dated this 8th day of September, 1973.

Jack E. Horsley
JACK E. HORSLEY

Subscribed and sworn to before me
this 8th day of September, 1973.

Doris M. Moynihan
Notary Public

IN THE

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BRIEF OF THE ILLINOIS STATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

I.

CONSENT TO FILE

Consent to file this brief amicus curiae has been granted in writing by attorneys for the Petitioners. Respondents, by their authorized attorney, have declined to consent but do not object and will not object to this Court's allowing Movant's Motion for Leave to File an Amicus Curiae Brief.

II.

INTEREST OF THE AMICUS CURIAE

The Illinois State Bar Association is the principal lawyers' organization in the State of Illinois. Although a voluntary association, its membership includes over fifteen thousand of the twenty thousand lawyers in Illinois and since its founding in 1878 has been among the most vigorous and effective of voluntary bar associations in the nation.

In recent years, the Association has become particularly active in the field of judicial administration and has for some time regularly conducted judicial advisory polls to better advise the public of the qualifications of candidates for the judiciary of the State of Illinois. The Association has played an active and integral part in supporting and establishing far-reaching constitutional and statutory changes in Illinois affecting the judiciary. This work has been done through Sections of the Association directly concerned with Judicial Administration, Individual Rights and Responsibilities and Appointments to the Federal Judiciary. The Association has worked diligently and effectively to support and maintain both independence of the judiciary of the State of Illinois and high standards for sitting judges.

The interest of this Association in the present case is manifest: the decision of the Seventh Circuit threatens to substantially impair if not completely destroy the independence of the judiciary of the State of Illinois. The Association is vitally interested in that subject on a professional basis and because of its obligation to the courts

generally as well as the public and its own membership has a direct and immediate interest in this litigation and is in a position to and has a positive obligation to present data and suggestions in support of the position taken by the Petitioners in this matter.

III.

SUMMARY OF ARGUMENT

1. The Civil Rights Act did not abrogate complete judicial immunity of state court judges from suits at law or in equity or otherwise or their total and complete independence in deciding cases.

2. The impairment of judicial immunity and independence in deciding cases of state judges resulting from the decision of the Seventh Circuit below is inconsistent with:

(a) Article IV, Sec. 4 of the United States Constitution,

(b) Independence of the federal judiciary as heretofore known,

(c) The proper balance between the state and federal judiciaries, and

(d) Continued effective protection under present law of constitutional rights of a criminal defendant.

3. The decision below erroneously authorizes suits having most grave effects on the administration of criminal justice by both the federal and state judiciaries based on conclusory, non-specific allegations only regarding the state of mind of a defendant judge rather than the conduct of such defendant.

4. The decision below would effectively cripple administration of criminal justice by both the state and federal judiciaries.

IV

ARGUMENT

May It Please The Court:

A.

The Civil Rights Act Did Not Abrogate Judicial Immunity Of State Court Judges From Suits At Law Or In Equity Or Otherwise Nor Authorize Supervision Of The Judicial Function Itself.

In *Pierson* v. *Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967) this Court held that the Civil Right Act of 1871, 17 Stat. 13, 42 U.S.C. sec. 1983, did not abrogate the doctrine of judicial immunity of state judges so that the remedy given by section 1983 to an aggrieved party in "an action at law, suit in equity, or other proper proceeding . . ." cannot be invoked against a state judge. In reaching that conclusion, this Court stated:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, . . . This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied liti-

> gants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.
>
> "We do not believe that this settled principle of law was abolished by .....§.....1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held . . . , that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine. 386 U.S. at 553-555, 87 S.Ct. at 1217-1218.

This Court based its opinion in large part upon *Tenney* v. *Brandhove*, 341 U.S. 367, 71 S.Ct. 783 (1951) which held that immunity of legislators for acts within their legislative role was not in fact abolished. In a scholarly opinion by Justice Frankfurter, the legislative history was reviewed in detail. (The Seventh Circuit suggests that the review was not comprehensive nor fully informed since it did not refer to the legislative history of previous Civil Rights Acts, 468 F.2d at 405.) Also in *Pierson*, this Court favorably commented upon the then uniform holdings of the Courts of Appeals that judicial immunity is a complete defense to an action under section 1983, 386 U.S. at 555, 87 S.Ct. at 1218, including the opinion of the Third Circuit in *Bauers* v. *Heisel*, 361 F.2d 581 (3rd Cir., 1966) which the Court of Appeals below itself described as an opinion containing "one of the most complete compilation of cases ever made in this area," 468 F.2d at 405-406.

As noted in Petitioners' Brief herein, there are cases in the books where prohibitory injunctions have issued against judges prohibiting them from exercising the judicial function or in some cases from performing a ministerial act and where writs of mandamus have issued commanding a judge to perform his judicial duties. (A noteworthy example is *Michum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151 (1972) where a state court judge was enjoined from proceeding at all in a certain case.) There are no cases, however, except the one appealed from, holding that the judicial function itself is subject to supervision other than through normal channels of appeal or post-conviction review. Whatever limits there may be to the doctrine of judicial immunity it certainly encompasses the act of deciding cases and any phase of the decisional function itself. It has been noted that there can be no disagreement ". . . as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler* v. *Judicial Council of Tenth Circuit of the United States*, 398 U.S. 74, 84, 90 S.Ct. 1648, 1653 (1970), c.f. also Cook, "Perceptions of the independent trial judge role in the seventh circuit," *6 Law & Society Review 615* (May, 1972). Whatever limitations the law may recognize either on constitutional or nonconstitutional bases, there is no precedent for nor reason supporting any assertion of supervisory authority over the judicial function itself. So long as any vestige of judicial immunity is recognized in the law, the decisional act and any phase of the decisional function are totally insulated from such supervision. It may well be that as cases are presented to the courts it may be found desirable for equity to invoke jurisdiction over just what areas of judicial decision making a state or federal judge

will actually enter upon but it is inconceivable that even in the future this or any other Court will hold that the Seventh Circuit is correct under precedent or reasoning or wise as a matter of policy in holding that it is desirable to allow supervision of the very judicial act itself. It is common place to note that an independent judiciary is part and parcel not only of our jurisprudence but our very society; it is equally true but perhaps not so much noted that a non-independent judge insofar as his decision making is concerned is totally unknown to our law. The holding of the Seventh Circuit not only is bad law and bad policy but is the very antithesis of law since it would preclude the essence of law, the judicial function.

The Seventh Circuit, while evidently not convinced by the historical analysis of this Court in *Tenney* and *Pierson* and purporting to accept the authority of those decisions in fact does not because it suggests the injunction request by Respondents is a distinguishing factor. Whatever the rationale advanced by this Court or the accuracy or lack thereof of this Court's reading of history supporting its decisions in *Tenney* and *Pierson*, this Court has in fact held that the doctrine of judicial immunity still obtains notwithstanding enactment of section 1983. The Seventh Circuit suggests that because this Court has never passed upon the defense of judicial immunity to an injunction suit attempting to operate upon the very decision making process itself that such a suit may be allowed consistent with refusal to allow damage suits against judges and that both things can be reconciled with the doctrine of judicial immunity. This is fallacious. If in fact damage suits, which are in the nature of things post-judicial act occurrences, are thought to be such an

intimidating factor upon the judicial function of a judge that they should not be allowed because of the doctrine of judicial immunity how much more repugnant to that doctrine is equitable intervention which operates immediately and directly upon and contemporaneously with the very judicial act itself. If in fact the type of injunctive relief sought by Respondents here is permissible then damage suits also would be permissible. The very limited types of injunction suits allowed in some of the cases have prohibited acts of judges totally beyond their jurisdiction or acts regarded as ministerial and there have been no cases where direct injunctive supervision has been allowed over the very judicial function itself.

The Seventh Circuit seems to imply that the supervising federal district judge need not sit "in constant, day-to-day supervision of . . . state court judges . . ." 468 F.2d at 414. In that event, how is the supervising federal judge to do anything more than attempt to exercise some crude type of appellate review. One of the great distinctions between the trial judge and his judicial function and all other judges and theirs, even those that review the trial judgment, is that the trial judge sees the parties and evaluates the objective personal presence of the defendant and other persons and witnesses in court. The Seventh Circuit seemingly would have the supervising federal judge take a controlling part in the decision-making process without any face to face contact with the persons to be affected by the supervision. This is another illustration of the unworkability of the Seventh Circuit's holding.

The Seventh Circuit states that: ". . . plaintiffs have not sought to enjoin the state from prosecuting anyone,

but merely to enjoin the judges from unconstitutionally affixing bail and sentences. . . ." 468 F.2d at 408. Although the Seventh Circuit doesn't express in so many words the thought that all Respondents seek here is a prohibitory injunction that is the purport of what is stated. In fact the equitable relief sanctioned by the Seventh Circuit goes far beyond any prohibitory equitable order and is as much and more a mandatory injunction, with all of the attendant supervisory procedures that involves, as a mandatory order from the Seventh Circuit to a state judge to provide equal protection of the laws in sentencing or granting bail or an order that black criminal defendants are to be given the same sentences as white criminal defendants. However the Seventh Circuit would characterize the type of relief it authorizes, and its description is far from clear, clearly the relief sanctioned goes far beyond a mere prohibitory injunction but involves detailed supervision of the judicial function itself. This is something equity has never undertaken, is not competent to do and should not do if the parallel judicial systems are to remain independent and effective in our federal system.

B.

Destruction Of Judicial Immunity Of State Judges By The Decision Of The Seventh Circuit Is Inconsistent With The Constitution, Affects The Independence Of The Federal Judiciary And Its Relations With State Judiciaries And Has The Opposite Effect Of That Intended Upon Rights Of Criminal Defendants.

If the decision of the Seventh Circuit were correct as a matter of law the decision would still be erroneous

since it is inconsistent with the Constitution in that Section 4 of Article IV guarantees to every State a "Republican Form of Government . . . ." As noted in *Bauers* v. *Heisel*, 361 F.2d 581, 588-589 (3d Cir., 1966):

> "The framers of the Constitution clearly evinced their belief that a separate and independent judiciary is an indispensable element of a republican form of government. See The Federalist, pp. 236, 303-305, 488 et seq., 494 et seq. We believe that abrogation of judicial immunity by Congress would destroy the independence of the judiciary and the various States, and consequently deprive them of a republican form of government."

The Third Circuit also noted that if in fact the Guarantee clause was violated by Congress, a serious question of justiciability would be presented and the competence of the federal judiciary to remedy a violation by Congress would be most doubtful. In *Bauers* the Third Circuit emphasized the importance of adopting a construction which would avoid such a result. This consideration was not even mentioned by the Seventh Circuit below, however, apparently on the theory that the Third Circuit was wrong in concluding that destruction of judicial immunity deprived a state of its republican form of government.

While the Seventh Circuit did not speak of any change in the status of the federal judiciary clearly an aggrieved criminal defendant unsatisfied with the conduct of a federal district judge in past cases, which to the criminal defendant might show a "pattern" of discrimination, could seek injunctive relief in advance of hearing of his own case on petition for a writ of habeas corpus in the federal district court seeking review of a state court conviction.

This would be consistent with the interpretation of the Seventh Circuit of section 1983 of Chapter 42. Despite recent seeming limitations upon the historic position of complete independence of federal trial judges, there is no disagreement ". . . as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function," *Chandler* v. *Judicial Council of Tenth Circuit of the United States*, 398 U.S. 74, 84, 90 S.Ct. 1648, 1653 (1970), reh. den. 399 U.S. 937, 90 S.Ct. 2248 (1970). Under the Seventh Circuit's theory in this case, however, an exception would be created wherever a federal district judge was dealing with the rights of a criminal defendant under a state statute, ordinance, regulation, custom or usage. It is interesting to note in the present case itself that the Seventh Circuit ordered the proceedings on remand to be assigned to a different district judge, 468 F.2d at 415, notwithstanding circuit rule 23 effective May 4, 1972 providing that whenever a case tried in the district court in the Circuit is remanded by the Court of Appeals for a new trial or hearing it is to be automatically reassigned for trial before a judge other than the judge who heard the prior trial. Does this suggest that the district judge who hear this case originally could be enjoined from hearing cases involving alleged civil rights of aggrieved criminal defendants? Would the Seventh Circuit's rather heavy handed action in that respect help respondents to deal with their "admittedly difficult" problem of proof, see 468 F.2d 389 at 408? Would not every utterance of a court of review regarding a particular trial judge in the course of passing on a particular case be admissible in evidence at some subsequent hearing of the type authorized by the Seventh Circuit here? Would not every reviewing court therefore not only

have to consider all the many things it must consider at the present time in preparing an opinion and disposing of cases on review but also the possible future effects in other litigation of its opinion which might be entirely unintended by the court of review? The Seventh Circuit makes no comment about this difficulty. Clearly, the independence of the federal judiciary itself as it has been known throughout our constitutional history is seriously compromised by the decision of the Seventh Circuit herein.

The effects of the decision below will derange the proper balance in the delicate relationship between the state and federal judiciaries. The Seventh Circuit's Opinion is inconsistent with the principles of comity between the two judicial systems discussed in *Younger* v. *Harris*, 401 U.S. 37, 43-46, 50-56, 91 S.Ct. 746, 750-751, 753-755 (1971) and is unsupported by this Court's decision in *Mitchum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151 (1972) where it is far from clear the Court was dealing with a criminal prosecution at all and in any event was not dealing with the criminal prosecution of the type allegedly threatened by Respondents in this cause. As noted above, *Mitchum* involved a true prohibitory injunction which precluded the state judge from acting at all and not one, as here, where the federal district court supervised the state judge's acts, as he performed them. This Court has repeatedly emphasized the importance of maintaining the delicate balance between the two judiciaries so as not to impair the independence or effectiveness of the state judiciary and even where the paramount federal power has been recognized, this Court has been at pains to recognize the special circumstances present which justify intervention which is always regarded as an extraordinary procedure. *Mitchum* v. *Foster*, *supra*. By contrast, the Seventh Cir-

cuit's approach seems to be that because there is no exact precedent *for bidding* the specific type of action brought by respondents, the action should be allowed.

The Court of Appeals obviously was impressed by the state of administration of criminal justice in Illinois at the present time as it referred, with apparent disapproval, to the standard of proof of sentence in criminal matters delineated in *People* v. *Bonner*, 37 Ill.2d 553, 563 (1967) cert. den. 392 U.S. 910, 88 S.Ct. 2067 (1968). That standard is that "Imposition of sentence is a matter of judicial discretion, and in the absence of a manifest abuse of that discretion it will not be altered by a reviewing court." Far from being an infringement of constitutional rights, this is a clear statement of an enlightened system of individualized justice which attempts to fit the sentence to the offender rather than to the crime. The Court of Appeals apparently was impressed with its belief that in Illinois ". . . the individual defendant in a criminal case finds it extremely difficult, if not impossible, to obtain review of his sentence as long as it is within the statutory limits." 468 F.2d at 408. As noted in Halperin, "Appellate review of sentence in Illinois—reality or illusion?" 55 Ill. Bar. J. 300 (Dec., 1966) the power of intermediate appellate courts in Illinois to alter and modify criminal sentences on appeal has been applied "most rationally and perceptively" by the Fifth District Appellate Court of Illinois, the Appellate Court that hears criminal appeals from Alexander County, Illinois. Chapter 37 ¶ 5, Illinois Revised Statutes (1971). But putting aside such enlightened and progressive statutory patterns and administration by appellate courts, this Court has held that federal courts should refuse to intervene in state criminal proceedings even to suppress the use of evidence unlawfully seized

until state remedies are exhausted, *Stefanelli* v. *Minard*, 342 U.S. 117, 124ff, 72 S.Ct. 118, 122ff (1951).

Every criminal defendant in Illinois has the right to change of venue or substitution of judge, Chapter 38:114-5, 114-6, Illinois Revised Statutes (1971), and may apply either to the Chief Judge of the particular circuit in which trial is to be had for assignment of a different judge or to the Supreme Court of Illinois and its Administrator for reassignment or substitution of a judge. Illinois Constitution of 1970, Article VI, sec. 7(c). Further, in addition to the ordinary procedures of trial and appeal, Illinois has a post-conviction review act providing a convicted criminal defendant who has exhausted his rights of initial appeal with a forum for consideration of any contention he makes that he has sustained a substantial denial of his rights under the Constitution of either the United States or of the State of Illinois or both, Chapter 38:122-1 et seq., Illinois Revised Statutes (1971).

It should be noted also that if an Illinois state judge persists in willful conduct in office or other conduct that is prejudicial to the administration of justice or brings the judicial office into disrepute, fully adequate disciplinary procedures exist which provide for suspension and removal where appropriate, Illinois Constitution of 1970, Article VI, sec. 15(e).

Beyond this comprehensive state procedural scheme which in fact does fully protect and take cognizance of all complaints, constitutional and nonconstitutional, in the field of criminal law, lies the federal judiciary with its remedies of habeas corpus. As this Court noted in *City of Greenwood Mississippi* v. *Peacock*, 384 U.S. 808, 829, 86 S.Ct. 1800, 1813 (1966):

> "But there are many other remedies available in the federal courts to redress the wrongs claimed by the individual petitioners in the extraordinary circumstances they allege in their removal petitions. If the state prosecution or trial on the charge of obstructing a public street or on any other charge would itself clearly deny their rights protected by the First Amendment, they may under some circumstances obtain an injunction in the federal court. . . . If they go to trial and there is a complete absence of evidence against them, their convictions will be set aside because of a denial of due process of law. . . . If at their trial they are in fact denied any federal constitutional rights, and these denials go uncorrected by other courts of the State, the remedy of federal habeas corpus is freely available to them. . . . If their federal claims at trial have been denied through an unfair or deficient fact-finding process, that, too, can be corrected by a federal court. . . ."

What the Seventh Circuit and the respondents seem to contend is that not only is the Illinois State system with its full rights of appeal, change of venue, post conviction review, etc. incompetent to protect the rights of the persons Respondents allege will be aggrieved in the future but the federal judiciary also with all its remedies and particularly habeas corpus is likewise incompetent to deal with the future claims of allegedly aggrieved criminal defendants. To state this is to refute the position of the Seventh Circuit and the Respondents and it is noteworthy that neither that Court nor the Respondents have formulated the claims made in just that way even though that is precisely what is involved. For the present action to be sustained there must be a finding that the injuries are immediate and irreparable to Respondents and those they represent and that there is no other adequate remedy. As is shown summarily herein and in much more detail in

briefs filed on behalf of the Petitioners herein, remedies abound in both the state and federal system.

Another unanswered question created by the opinion of the Seventh Circuit is whether the supervision contemplated by that Court to be carried out by the local federal district judge over the Petitioners is to directly affect the rights of a criminal defendant before one or both of the Petitioners. Whichever way the question is answered, insurmountable problems are immediately apparent.

If supervision by the district judge is to directly affect the status of the criminal defendant and supersede the acts of the state judge, what effect does this have on subsequent proceedings on review or otherwise in other state courts of Illinois or, for that matter, subsequently in the federal judiciary on writ of habeas corpus or some other proceeding? Is the supervisory act of the federal district judge beyond review? It should not be assumed that every supervisory act of the federal district judge will be favorable to the aggrieved criminal defendant. If the supervisory act is unfavorable to a contention or a position of the aggrieved criminal defendant, what right of review does he have? Further, is the supervisory act of the federal district judge to be subject in any way to alteration or amendment by the courts of review in the State of Illinois? If so, is the right of review there exclusive and does a criminal defendant seeking review in the state system preclude review in the federal judiciary of a supervisory act of a federal district judge thought by the criminal defendant to be discriminatory or, for that matter, erroneous. The Brief of Petitioners in Number 72-955, at pp. 36-37, demonstrates many other such analogous problems and, as noted there, the list is not exhaustive.

On the other hand, if the act of supervision by the federal district judge is not to affect the rights of the criminal defendant then what other purpose can the procedure sanctioned by the Seventh Circuit have than simple harassment of state judges. If the only effect of the supervisory order to be entered by the federal district judge is avoidance or receipt of a contempt citation and penalty therefor operating against the state judge only, then the criminal defendant certainly is not affected one way or the other by this most cumbersome and unfortunate procedure sanctioned by the Seventh Circuit. Of course there is no justification for either simple harassment of state judges or supervision at their judicial acts as they are performed.

Not only does the procedure sanctioned by the Seventh Circuit add nothing to the existing rights of criminal defendants but existing rights would be impaired by such a procedure. This is because the state judge, operating under supervision which might lead to contempt on his part must not only look at the individual case before him in which a minority person may be charged and convicted with a crime in which he must render sentence but must apparently take into consideration all other cases before him and somehow work out an acceptable pattern in sentencing that can be established and proven in a court of equity. This has several unfortunate effects. First, the state judge is necessarily going to consider not only every other case he has had and the wisdom that may have accrued as a result of that experience but he must somehow harmonize the case before him with all past cases so that an acceptable pattern on a ratio basis is manifest. Secondly, even if the balance and pattern sought by the supervising federal judge is achieved, constitutional rights of

the defendants before the state judge may be infringed and justice in a nonconstitutional sense also may be impaired. This is because a criterion based solely upon race may be seriously misleading. This analysis is developed in detail in the Brief of the District Attorney of the County of Los Angeles, State of California as amicus curiae, pp. 12 and Appendix A. Furthermore, a state judge considering a nonminority criminal defendant would necessarily tailor the sentence administered in that nonminority individual's case so that it would comprise an acceptable part of the pattern vis-a-vis minority criminal defendants' sentences which would thus deny the nonminority criminal defendant his individual right to due process and equal protection of the laws. Thus not only is protection of existing rights of criminal defendants not enhanced by the decision below but existing rights of all criminal defendants are jeopardized.

C.

The Decision Below Erroneously Authorizes Suits Having Grave Effects On The Administration Of Justice Based On Conclusory, Non-Specific Allegations Only Of The State Of Mind of Defendant Judges Rather Than Conduct Of Such Defendants.

Given the enormous consequences of implementation of the Seventh Circuit's opinion, the very least that should have been required by that Court was some specificity about present conditions and acts of the Petitioners. As this Court noted in *Boyle* v. *Landry,* 401 U.S. 77, 80-81, 91 S.Ct. 758, 760 (1971):

> "It is obvious that the allegations of the complaint in this case fall far short of showing any irreparable injury from threats or actual prosecutions under the

intimidation statute or from any other conduct by state or city officials. Not a single one of the citizens who brought this action had ever been prosecuted, charged, or even arrested under the particular intimidation statute which the court below held unconstitutional. All the charges of the complaint deal broadly and generally with all the state statutes and city ordinances that the appellees originally challenged. In fact, the complaint contains no mention of any specific threat by any officer or official of Chicago, Cook County, or the State of Illinois to arrest or prosecute any one or more of the plaintiffs under that statute either one time or many times. Rather, it appears from the allegations that those who originally brought this suit made a search of state statutes and city ordinances with a view to picking out certain ones that they thought might possibly be used by the authorities as devices for bad-faith prosecutions against them. There is nothing contained in the allegations of the complaint from which one could infer that any one or more of the citizens who brought this suit is in any jeopardy or of suffering irreparable injury if the State is left free to prosecute under the intimidation statute in the normal manner . . . . the normal course of state criminal prosecutions cannot be disrupted or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future. The policy of a century and a half against interference by the federal courts with state law enforcement is not to be set aside on such flimsy allegations as those relied upon here."

How much more compelling the language is when the attack is made not merely upon state law enforcement activities but upon the very judicial function itself.

D.

The Decision Below Would Effectively Cripple The Administration Of Criminal Justice By Both The State And Federal Judiciaries.

As noted above, the holding of the Seventh Circuit would expose federal judges, at least to a limited extent, to supervision of the type sanctioned by the Seventh Circuit for Illinois state judges. (The problem of discrimination can be as acute, if not more so, in the federal judiciary as in the state judiciary, see Griswold, *Law and lawyers in the United States: the common law under stress,* pp. 145-146 (Cambridge, 1965).) The effects of the Seventh Circuit's decision, however, would be so administratively overwhelming upon both the state and federal judiciaries as to make all administration of criminal law virtually unworkable.

In both state and federal systems, backlog in trial and appellate courts is a most serious problem. While Illinois had made and continues to make valiant efforts in combating the problem both at the trial and appellate levels through activities of this amicus and the Judicial Conference of Illinois established by the Supreme Court of that State and the Supreme Court's Administrative Office, the progress achieved is won at the cost of great effort and could easily be frustrated by any sudden and unremitting increase of new cases. It is clear that not only would Illinois state trial judges be subject to supervision by the local federal district judge under the decision below but any other member of the state judiciary including the intermediate appellate court and the state supreme court itself would be also. Thus, not only would the confusion reign over the trial courts in Illinois but throughout the entire judicial system.

This Court needs no documentation of the serious problems existing today in the district and appeals courts of the United States in terms of dockets. It is ironic that at such a time the Seventh Circuit, one of the most seriously burdened of all federal circuits, has initiated a procedure which would completely engulf the federal system and yet not protect to any greater extent than present procedures rights of criminal defendants.

The argument made on this point is not merely that the courts would be burdened to a somewhat greater extent than they are today by a new type of case. The argument is that the clear implications of the Seventh Circuit's holding indicate an immediate increase of case loads to such an extent that the very capacity of the federal and Illinois judicial systems to cope with criminal cases would be seriously impaired and possibly eliminated. In all of the briefs and materials presented to this Court in this matter reference is made repeatedly to fundamental propositions but surely there is nothing more fundamental that court systems that are paralyzed can give no relief to anybody.

V.

CONCLUSION

Because of the above stated reasoning and authorities, this Court should reverse the judgment herein of the United States Court of Appeals for the Seventh Circuit and affirm the judgment of the United States District Court for the Eastern District of Illinois dismissing with prejudice in final bar of action the Respondents' Amended Complaint as to Petitioners herein.

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